

**SUBCHAPTER E : ISSUANCE AND CONDITIONS OF WATER PERMIT
OR CERTIFICATE OF ADJUDICATION
§§297.41-297.57
Effective May 30, 1997**

§297.41. Subject to Prior and Superior Water Rights.

A permit or certificate of adjudication to appropriate state water granted by the commission shall be subject to all prior and superior rights of others using water on the stream or other source of supply.

§297.42. Additional Limitations.

The commission will incorporate into every permit or certificate of adjudication any condition, restriction, limitation or provision reasonably necessary for the enforcement and administration of the water laws of the state and the rules of the commission.

§297.43. Requiring Storage Facilities.

Except for an application for an emergency, temporary, seasonal, or term permit, the commission may require an applicant to provide storage sufficient to yield the requested annual diversion.

§297.44. Acceptance of Permit or Certificate of Adjudication.

Acceptance of the permit or certificate of adjudication by the water rights holder will be an acknowledgment and agreement that the holder will comply with all the terms, provisions, conditions, limitations and restriction embodied in such permit or certificate of adjudication. The exercise of rights under a permit authorizing the inundation or installation of a structure upon the land of another will be conditioned upon the continued effectiveness of an easement or agreement between the parties.

§297.45. Return and Surplus Waters.

- (a) A right to take and use water is limited to the extent and purposes authorized in the water right.
- (b) All return and surplus water shall be returned to a source of water supply or watercourse at the point or points stated in the permit, certificate of adjudication or amendatory orders of the commission. Return water shall conform to quality standards set by the state.

§297.46. Suppliers of Water for Irrigation.

Persons supplying state water for irrigation purposes shall charge the purchaser on a volumetric basis. The commission may direct suppliers of state water to implement appropriate procedures for determining the volume of water delivered.

§297.47. Time Limitations for Commencement or Completion of Construction.

When a permit is issued for appropriation by direct diversion or construction, modification or repair of a storage reservoir, or any work in which a time limitation is set by permit for commencement or completion of construction, a permittee shall commence and complete actual construction of the proposed facilities within the time fixed by the commission. Failure to commence or complete construction within the time specified in the permit or extension granted by the commission shall cause permittee to forfeit all rights to the permit, subject to notice and hearing. See §295.202 of this title (relating to Reports).

§297.48. Low-Flow Outlets for Dams.

All dams proposed for authorization by the commission shall provide for outlets of size and location sufficient to pass such flows of water as the commission finds necessary to satisfy the rights of downstream domestic and livestock users, the senior and superior rights of other authorized users, instream flow requirements, and estuarine inflow requirements.

§297.49. Habitat Mitigation.

In its consideration of an application for a permit or amendment to store, take, or divert state water, the commission shall assess the effects, if any, of the issuance of the permit on fish and wildlife habitats. For an application for a permit or amendment to store, take, or divert state water in excess of 5,000 acre-feet per year, the commission may require the applicant to take reasonable actions to mitigate adverse impacts, if any, on such habitat. In determining whether to require an applicant to mitigate adverse impacts on a habitat, the commission may consider any net benefit to the habitat produced by the project. The commission shall offset any mitigation it requires by any mitigation required by the United States Fish and Wildlife Service pursuant to 33 Code of Federal Regulations Sections 320-330.

§297.50. Water Quality Effects.

In its consideration of an application for a permit to store, take or divert water, the commission shall assess the effects, if any, of the issuance of the permit on water quality of the stream or river to which the application applies.

§297.51. Estuarine Considerations.

In its consideration of an application for a permit to store, take, or divert water, the commission shall assess the effects, if any, of the issuance of the permit on the bays and estuaries of Texas. For permits issued within an area that is 200 river miles of the coast, to commence from the mouth of the river thence inland, the commission shall include in the permit, to the extent practicable when considering all public interests, those conditions considered necessary to maintain beneficial inflows to any affected bay and estuary system.

§297.52. Instream Uses.

In its consideration of an application for a permit to store, take, or divert water, the commission shall consider the effects, if any, of the issuance of the permit on existing instream uses of the stream or river to which the application applies.

§297.53. Conservation and Beneficial Use.

(a) The right to use state water under any permit, certified filing, or certificate of adjudication is limited to the amount which is being or can be beneficially used for the authorized purpose but not to exceed the amount specifically appropriated.

(b) Only that amount of water that may be beneficially used for the authorized purpose may be diverted. Water which is taken in excess of that needed for the authorized purpose is considered surplus water, not appropriated, and must be returned to the stream of origin if reasonably practicable to do so by gravity flow.

(c) The right to appropriate that amount of water not beneficially used cannot be perfected and is subject to limitation, cancellation, or forfeiture as provided by law.

(d) A water right holder using state water shall use those measures necessary to ensure the beneficial use of water without waste in accordance with these rules and the terms and conditions of the water right and applicable law.

§297.54. Waste.

(a) The waste of water is prohibited and is an unlawful use of state water.

(b) The use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose constitutes waste. Waste also includes the diversion or use of water in any manner that causes or threatens to cause pollution of water in violation of applicable rules and standards.

(c) A person who permits an unreasonable loss of water through faulty design or negligent operation of any waterworks commits waste, and the commission may declare the waste to be a public nuisance. Faulty design or negligent operation shall include, but not be limited to, the design or operation of waterworks not in accordance with applicable state or federal law, commission rules, plumbing fixture codes or ordinances, or other applicable law or, in the absence of such law, not in accordance with commonly accepted industry standards, engineering principles, and best management practices.

(d) The commission or a person injured by the waste of water as provided by subsection (c) may seek civil action in the appropriate state district court to have the nuisance abated and the commission may direct the person supplying the water to close the gates of the person wasting the water and keep them closed until the commission determines that the unlawful use of water is corrected.

§297.55. Consideration of Water Conservation Plans.

(a) Review. Information in the water conservation plan provided by a water right applicant shall be considered by the commission in determining whether any feasible alternative to the requested appropriation exists, whether the requested amount of appropriation as measured at the point of diversion is reasonable and necessary for the proposed use, the term and other conditions of the water right, and to ensure that reasonable

diligence will be used to avoid waste and achieve water conservation. Based upon its review, the commission shall determine whether to deny or grant, in whole or in part, the requested appropriation.

(b) Burden of proof regarding need for appropriation. A water conservation plan submitted with an application requesting an appropriation for new or additional state water must include data and information which:

(1) supports the applicant's proposed use of water with consideration of the water conservation goals of the water conservation plan;

(2) evaluates conservation as an alternative to the proposed appropriation; and

(3) evaluates other feasible alternatives to new water development, including but not limited to, waste prevention, recycling and reuse, water transfer and marketing, reservoir system operations, and optimum water management practices and procedures. It shall be the burden of proof of the applicant to demonstrate that no feasible alternative to the proposed appropriation exists and that the requested amount of appropriation is necessary and reasonable for the proposed use.

(c) Implementation. Any water conservation measures prescribed by the commission shall be implemented as required by the terms and conditions of a commission order or water right, or by rule.

§297.56. Conserved Water.

(a) The right to use that amount of water appropriated which is conserved as a result of the implementation of water conservation measures shall not be subject to cancellation or forfeiture if, subsequent to the effective date of having implemented the conservation measure(s), the water right holder submits to the executive director a sworn water management plan providing evidence that:

(1) the conserved water is needed in order to meet additional, specifically identified water needs of the water right holder; or

(2) the conserved water is being sold for a specific beneficial use or that portion of the water right is being transferred for beneficial use(s); or

(3) the water right holder requests that the watermaster or executive director make available to interested buyers or lessors at their request information indicating that the conserved water is available for lease or sale.

(b) A water management plan submitted in accordance with subsection (a) of this section may be submitted with the annual use report provided by §295.202 of this title (relating to Reports) and may be considered for the purposes of §11.173(b)(2), Texas Water Code. To qualify for purposes of §11.173(b)(2) Texas Water Code, a plan submitted pursuant to subsection (a) of this section may not result in more than a consecutive ten (10) year period of non-use of the conserved water.

(c) Based upon information contained in water right holders' water management plans provided by subsection (a) of this section or other information provided by the water right holders, the executive director or watermaster may construct maps and compile information indicating where and how much water, including conserved water, may be available for lease or purchase and make such information available to interested persons upon their request and payment of allowable fees. Fees may be assessed for the administrative and reproduction costs for this information in accordance with state law.

(d) The commission's review and action on an application to amend a water right, including an amendment relating to the sale or transfer of conserved water, shall consider the needs of instream uses for water quality, aquatic and riparian wildlife habitat, bay and estuaries, and other public purposes. Accordingly, the commission may reserve from appropriation water necessary to protect these instream uses by placing limitations and conditions on the amended water right. Such reservation is superior to the appropriative right and shall not be subject to the appropriative right except as expressly provided in the water right or by an order issued by the commission pursuant to §11.148 Texas Water Code.

§297.57. Emergency Suspension of Permit Conditions.

(a) The purpose of this section is to set forth the procedures and criteria to be used by the commission in its review and action on a petition by a water right holder for the temporary suspension of conditions in the water right relating to beneficial inflows to bays and estuaries and instream uses during an emergency if there are no practicable, feasible alternatives to the suspension, pursuant to Texas Water Code, §11.148. The procedures and emergency relief provided by this section shall only be used when the commission finds that emergency conditions exist that present an imminent threat to the public health, safety, and welfare and that override the necessity to comply with general procedures and criteria for changing the conditions in a water right and there are no feasible, practicable alternatives to the emergency authorization.

(b) Upon petition filed by the affected water right holder in accordance with this section, the commission shall consider and may approve the temporary suspension of all or a part of conditions in a water right relating to beneficial inflows to affected bays and estuaries and instream uses if the commission finds that an emergency exists and there is no feasible, practicable alternative to the suspension. The burden of demonstrating that the petition should be granted in accordance with this section is on the petitioner. For purposes of this section, an emergency is a condition where water supplies available to the petitioner have been reduced or impaired to such an extent that an imminent peril to the public health, safety, or welfare exists. Such condition may include, but not be limited to: the reduction of public water supplies to critical levels as a result of a severe and sustained drought; the failure of a dam for a public water supply reservoir; the significant contamination of a public water supply; or the failure or destruction of public water supply pipelines or other distribution systems.

(c) The petition shall be filed with the chief clerk of the commission and must be sworn and contain the following information:

(1) the name, address, and telephone number of the petitioner and copies of the affected permits, certificates of adjudication, or certified filings;

(2) a description of the emergency and its impact on public health, safety, and welfare;

(3) a description of all existing and potential water supplies available to the petitioner and their corresponding uses and costs;

(4) a summary of the examination made by the petitioner of whether feasible, practicable alternatives exist to the suspension of permit conditions and reasons why such alternatives do not exist;

(5) the amount of water over and above available supplies that are necessary to alleviate emergency conditions;

(6) copies of the water right holder's water conservation and drought contingency plans, if any, and a summary of their status and implementation, including the reasons why any remaining conservation or drought contingency measures provided by the plans have not or will not be implemented;

(7) a copy of the reservoir operating procedures, if applicable; and

(8) the proposed conditions and trigger levels for the suspension and reinstatement of the releases or other affected permit conditions.

(d) A copy of the petition must be filed by the petitioner with the Executive Director, Public Interest Counsel, and the Texas Parks and Wildlife Department (TPWD) at the same time it is filed with the chief clerk of the commission.

(e) Upon receipt of the petition, the chief clerk shall provide notice of the time and location of the commission's consideration of a petition to the TPWD, Executive Director, and Public Interest Counsel as soon as practicable after receipt of the petition, but in no event shall the petition be considered less than 72 hours after receipt of notice by the TPWD. The TPWD, Executive Director, and Public Interest Counsel shall be provided an opportunity to submit comments on the petition prior to commission action. The petitioner shall be afforded opportunity to respond to all comments at the time of the commission's consideration of the matter. If the commission initially grants an emergency suspension of permit conditions without a hearing, the order granting the emergency suspension shall fix a time and place for a hearing to be held before the commission to determine whether to affirm, modify, or set aside the initial granting of the emergency suspension of permit conditions. The hearing shall be held as soon after the emergency suspension is granted as is practicable but not later than 15 days after the initial emergency suspension is granted. The commission's order shall also set out the date any authorized suspension shall commence and end, the extent of any suspension, and any special condition upon which a suspension is granted. The commission's initial order may also indicate the referral of the matter to the State Office of Administrative Hearings for an expedited hearing under subsection (g) of this section.

(f) Published notice of the initial suspension of water right conditions, if granted, shall be provided and paid for by the petitioner immediately following a favorable commission initial decision on the petition by publication in a newspaper or newspapers of general circulation in the affected area. The published notice may not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. Such published notice must contain a summary of the information contained in the petition as provided by subsection (c) of this section and the time and location of the subsequent commission hearing provided by subsection (g) of this section. Such publication shall occur not later than

seven calendar days prior to such hearing. For the purposes of this rule, the affected area shall be each county, in whole or in part, downstream of the diversion point or impoundment authorized under the affected water right. The petitioner shall file with the chief clerk a publisher's affidavit as proof that such notice was published in accordance with this section.

(g) Within 15 days of the initial granting of the emergency suspension of permit conditions, the commission shall hold a hearing to determine whether to affirm, modify, or set aside the initial emergency suspension. The hearing shall be conducted in accordance with Government Code, Chapter 2001 and rules of the commission, and written notice of the hearing shall be provided to the Texas Parks and Wildlife Department and affected persons not later than 10 days before the hearing. For matters referred to SOAH, the Administrative Law Judge may, consistent with the requirements of Chapter 2001 of the Government Code, reduce the time periods specified in the Commission's procedural rules governing contested case hearings.

(h) An emergency authorization granted under this section may be for a period of not more than 120 days if the commission finds that emergency conditions exist that present an imminent threat to public health, safety, and welfare and that override the necessity to comply with permit conditions and there are no feasible, practicable alternatives to the emergency authorization. Such emergency authorization may be renewed once for not longer than 60 days.

(i) In determining whether feasible, practicable alternatives exist to the suspension of water right conditions, the commission shall examine the amount and purposes of use for water currently being used by the petitioner, all evidence relating to the availability of alternative, supplemental water supplies to the petitioner, and the petitioner's efforts to curtail water use not essential for the protection of the public health, safety, and welfare. If the water right holder has a water conservation plan and/or drought contingency plan, the suspension of water right conditions may be contingent upon the full implementation of such plans and measures corresponding to the staged reduction of releases for existing instream uses and beneficial inflows. If the water right holder does not have a water conservation plan and drought contingency plan in accordance with Chapter 288 of this title (relating to Water Conservation Plans, Guidelines and Requirements), the commission order granting a petition under this section shall require the permittee to develop and implement such plans within a prescribed time period as provided in the order.

(j) In granting a petition, all existing instream flows shall be passed up to that amount necessary to maintain water quality standards for the affected stream. Additional flows necessary to protect a species in accordance with the federal Endangered Species Act or other species that are considered to be of "high interest" (self-sustaining wild populations that are endemic to the affected stream, have significant scientific value, or commercial value) may also be required.

(k) In order to assist in the preparation and planning for water management during an emergency, the commission may provide conditions in a water right necessary for relief consistent with applicable portions of this section when the water right is initially granted or subsequently amended. These conditions may include, but shall not be limited to a staged approach to the reduction in the pass-through amounts that provide for the pass-through of water for instream uses and bays and estuaries when it is available, and allow water to be captured or diverted for the protection of the public health, safety, and welfare during an emergency, subject to the protection of stream flows necessary under subsection (j) of this section for the maintenance of water

quality standards. Such conditions may also include full implementation by the water right holder of water conservation and drought contingency plans as a precondition for obtaining relief.

(l) If the petitioner's water right already contains provisions for the temporary, total or partial suspension of permit conditions for the maintenance of instream flows or freshwater inflows to bays and estuaries, further or different relief requested in a petition submitted under this section generally will be denied unless the petitioner can show new or changed circumstances or an emergency condition not contemplated when the water right condition was issued.

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